

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06

Date: 11 June 2012

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

***SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE PROSECUTOR v .THOMAS LUBANGA DYILO***

**URGENT
Public**

Order on the defence request to present evidence during the sentencing hearing

Order to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabile

Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Mr Joseph Keta Orwinyo

Mr Paul Kabongo Tshibangu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber I of the International Criminal Court (“Trial Chamber” or “Chamber”) in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“Lubanga case”), issues the following Order on the defence request to present evidence during the sentencing hearing:

I. PROCEDURAL BACKGROUND

1. On 24 April 2012, the Chamber issued its “Order fixing the date for the sentencing hearing”.¹ The Chamber instructed the defence

“to file submissions on the sentence to be imposed on Mr Lubanga by 16:00 on 28 May 2012, taking into account the submissions of the prosecution and the legal representatives on the sentencing principles to be applied by the Chamber as well as the specific issues addressed in the submissions to be filed on 14 May 2012. In addition, the defence is to notify the Chamber as soon as practicable, and in any event no later than 28 May 2012, as to whether it will seek authorisation to present new evidence during the sentencing hearing”.²

2. On 25 May 2012, the defence urgently requested an extension of time to submit its request to introduce additional evidence and to file written submissions on sentencing.³
3. On the same day, the Chamber instructed the prosecution and the legal representatives of victims to file any responses to the defence request no later than 12.00 on 28 May 2012.⁴
4. On 28 May 2012, the prosecution filed its response to the defence request.⁵

¹ Order fixing the date for the sentencing hearing, 24 April 2012, ICC-01/04-01/06-2871.

² ICC-01/04-01/06-2871, paragraph 6.

³ Requête de la Défense aux fins de prorogation de délais, 25 May 2012, ICC-01/04-01/06-2884.

⁴ E-mail communication from a Legal Officer of the Trial Chamber to the parties and participants on 25 May 2012 at 15:26.

⁵ Prosecution’s Response to « Requête urgente de la Défense aux fins de prorogation de délais », ICC-01/04-01/06-2887.

5. In accordance with Regulation 35 of the Regulations of the Court (“Regulations”), the Chamber extended the deadline for the defence to submit a request to introduce additional evidence and to file written submissions on sentencing to 16.00 on 4 June 2012. The Chamber indicated that any responses to the defence request were to be filed no later than 12.00 on Monday 11 June 2012.⁶
6. On 4 June 2012, the defence filed its request to present evidence during the sentencing hearing (“defence request”).⁷ On the same day, the defence provided further details on its request to the Chamber, particularly on the possibility of using a video-link for the witnesses’ testimony.⁸
7. On 4 June 2012, the Chamber instructed the prosecution and the legal representatives of victims to provide their views on the proposed use of a video-link, should the Chamber grant the defence request, no later than 14.00 on 5 June 2012. The Chamber further instructed the Registry to make any preliminary arrangements to facilitate this procedure for the sentencing hearing on 13 June 2012.⁹
8. On 5 June 2012, the prosecution and the legal representatives for the V01 group of victims sent submissions on this issue to the Chamber by email.¹⁰
9. On 7 June 2012, the legal representatives for the V01 group of victims filed

⁶ Order on the defence request for an extension of time, 28 May 2012, ICC-01/04-01/06-2888.

⁷ Requête de la Défense sollicitant l’autorisation de présenter des éléments de preuve supplémentaires lors de l’audience sur la peine prévue le 13 juin 2012, 4 June 2012, ICC-01/04-01/06-2892 + Conf-Anxs1-4.

⁸ E-mail communication of defence counsel to the Trial Chamber on 4 June 2012 at 18:02.

⁹ E-mail communication from a Legal Officer to the Trial Chamber to the parties and participants on 4 June 2012 at 18:33.

¹⁰ E-mail communication of the prosecution to the Trial Chamber on 5 June 2012 at 13:05; E-mail communication of the legal representative of victims to the Chamber on 5 June 2012 at 13:55.

additional observations on the defence request with the Registry.¹¹ The prosecution similarly filed submissions with the Registry on 8 June 2012.¹²

II. SUBMISSIONS

Defence

10. The defence seeks to introduce the testimony of two witnesses. The defence suggests that the first proposed witness, D01-0039, will give evidence on: a) initiatives by Mr Lubanga to establish peace in Ituri; b) the assistance provided by Mr Lubanga to all ethnic groups between 2002-2003; and c) the scope of the relevant crimes.¹³ The second witness, D01-0040, will give evidence on b) and c) above.¹⁴ The defence submits that their evidence will be mutually supportive.¹⁵

11. The defence additionally wishes to introduce documents that have been provided by D01-0040, namely a copy of his electoral card (Annex 2 of the defence request) and a copy of a diploma (Annex 2 of the defence's request). The defence submits that these documents have sufficient indicia of reliability and they tend to confirm his civil status.¹⁶

12. The defence additionally requests the admission of document DRC-D01-

¹¹ Réponse des représentants légaux du groupe de victims V01 a la requête de la défense ICC-01/04-01/06-2892 du 4 juin 2012, June 2012, ICC-01/04-01/06-2893.

¹² Prosecution's Response to « Requête de la Défense sollicitant l'autorisation de présenter des éléments de preuve supplémentaires lors de l'audience sur la peine prévue le 13 juin 2012 », 8 June 2012, ICC-01/04-01/06-2894.

¹³ ICC-01/04-01/06-2892, paragraph 6 and Annex 1.

¹⁴ ICC-01/04-01/06-2892, paragraph 10 and Annex 1.

¹⁵ ICC-01/04-01/06-2892, paragraphs 6 and 10.

¹⁶ ICC-01/04-01/06-2892, paragraphs 11-14 and Annexes 2 and 3.

0001-0136 (Annex 4 of the defence request), namely a letter signed by Mr Lubanga in which he describes the treatment he received while in detention in the Democratic Republic of Congo (“DRC”).¹⁷ The defence submits that this document is relevant for the purposes of establishing the dates of Mr Lubanga’s pre-trial detention before his transfer to the seat of the Court, in order to assist the Chamber in its determination of any relevant period spent in detention pursuant to Article 78(2) of the Rome Statute (“Statute”).¹⁸ The defence indicates that this document was admitted into evidence during the pre-trial stage.¹⁹

13. The defence indicates that it may request leave to introduce further evidence, as it anticipates receiving additional documents prior to the sentencing hearing.²⁰

14. Both witnesses are able to testify via a video-link from the DRC. The defence estimates that the examination of the two proposed witnesses, in its entirety, will take approximately 3.5 hours.²¹

Prosecution

15. The prosecution does not resist the defence request to call the two witnesses or to tender the two documents through D01-0040. The prosecution indicates that its examination of each witness will last less than an hour.²² The prosecution does not object to the use of the video-

¹⁷ ICC-01/04-01/06-2892, paragraphs 15-16 and Annex 4.

¹⁸ ICC-01/04-01/06-2892, paragraphs 15 and 18.

¹⁹ ICC-01/04-01/06-2892, paragraph 17.

²⁰ ICC-01/04-01/06-2892, paragraph 19.

²¹ E-mail communication of defence counsel to the Trial Chamber on 4 June 2012 at 18:02.

²² ICC-01/04-01/06-2894, paragraph 4.

link.²³

16. The prosecution objects, however, to the introduction of document DRC-D01-0001-0136. The prosecution contends that it is irrelevant to the sentence to be passed on Mr Lubanga pursuant to Article 78(2) of the Statute because it fails to confirm that he was detained in the DRC or that he was held at the behest of the prosecution pursuant to an order of the Court or in connection with conduct relating to the crimes at issue in the present case.²⁴

Victims' Legal representatives

17. The legal representatives for the V01 group of victims oppose the admission of any additional evidence since they suggest this could substantially alter the subject matter of the sentencing hearing. In their submission, any additional evidence would need to be tested, including by way of rebuttal witnesses called by the prosecution.²⁵ Additionally, the legal representatives submit that the new testimony may affect the interests of the victims, and the legal representatives suggest they should be permitted to request leave to examine the relevant witnesses.²⁶ The legal representatives indicate they may request to be allowed to respond in an appropriate manner to any additional evidence that is introduced with the leave of the Chamber, including by way of additional written submissions.²⁷

18. The victims' legal representatives oppose the use of a video-link to hear

²³ E-mail communication from the prosecution to the Trial Chamber on 5 June 2012 at 13:05.

²⁴ ICC-01/04-01/06-2894, paragraph 5.

²⁵ ICC-01/04-01/06-2893, paragraph 4.

²⁶ ICC-01/04-01/06-2893, paragraph 5.

²⁷ ICC-01/04-01/06-2893, paragraphs 5 and 6.

the two proposed witnesses, as they suggest that there is a risk that they will be confronted by supporters of Mr Lubanga who could influence their evidence.²⁸

III. ANALYSIS AND CONCLUSIONS

Witnesses

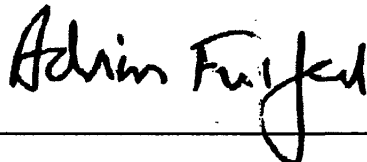
19. The evidence of the two proposed witnesses (D01-0039 and D01-0040) is *prima facie* relevant to the issues that are to be addressed during the sentencing hearing, pursuant to Article 78(1) of the Statute and Rule 145 of the Rules of Procedure and Evidence (“Rules”). Their testimony is potentially of assistance as regards the various aggravating or mitigating factors relevant to the sentence to be imposed.
20. Accordingly, the defence may call these two witnesses during the sentencing hearing, in accordance with Article 76(2) of the Statute. Their evidence will be given via a video-link with the DRC, pursuant to Rule 87(3)(c) of the Rules, given that this provides an effective means of hearing their testimony without delaying the proceedings. There is no evidence to support the suggestion that supporters of Mr Lubanga will attempt to influence their testimony.
21. The defence is to inform the Victims and Witnesses Unit (“VWU”) and the Chamber immediately if protective measures are sought for the purposes of their testimony.

²⁸ E-mail communication of the legal representatives of victims to the Chamber on 5 June 2012 at 13:55.


Documentary evidence

22. The documents that concern the identity of witness D01-0040 (Annexes 2 and 3 of the defence request) are potentially relevant to his evidence, given they tend to prove his civil status and age at the time of the events in question. They are to be introduced by the witness himself, for the purposes of authentication. The defence is to provide copies to the Registry for use during the video-link testimony of witness D01-0040.
23. Document DRC-D01-0001-0136 is potentially relevant to the issue as to whether Mr Lubanga spent a period of time in custody that should be deducted from any sentence of imprisonment that is imposed, pursuant to Article 78(2) of the Statute. The Chamber therefore permits the defence to introduce this document into evidence, although the final determination of its probative value and relevance will be determined in due course.

Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 11 June 2012

At The Hague, The Netherlands